UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

PRIDDIS MUSIC, INC.,

Plaintiff,

- against -

05-CV-0491
DNH/DHR

TRANS WORLD ENTERTAINMENT
CORPORATION,

Defendant.

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO PARTIALLY DISMISS THE COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

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INTRODUCTION

Plaintiff Priddis Music, Inc. ("Priddis"), hereby submits this Memorandum of Law in opposition to defendant Trans World Entertainment Corporation's ("TWEC") Motion to Partially Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) ("Motion"). TWEC seeks to dismiss all but two of Priddis' claims, including Priddis' claims of: (1) fraud; (2) breach of the implied covenant of good faith and fair dealing; (3) conversion; and (4) unjust enrichment. In addition, TWEC moves to strike Priddis' demands for punitive damages and attorneys fees. With the exception of Priddis' separate cause of action for breach of the implied duty of good faith and fair dealing and its request for attorneys' fees, which Priddis hereby withdraws, TWEC's Motion must be denied.[1]

Priddis' fraud claim survives dismissal because its complaint sufficiently alleges that TWEC fraudulently induced Priddis to enter one or more agreements through misrepresentations and/or material omissions that were collateral to one or more of such agreements and were made with a present intent not to carry out such promises. Further,

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1 Priddis' withdrawal of its separate cause of action for breach of implied duty of good faith and fair dealing is intended to be merely a concession to TWEC's argument that such claim is duplicative of Priddis' breach of contract claim under New York law. By withdrawing such cause of action, Priddis by no means concedes that TWEC was not subject to a duty to act in good faith under its agreements with Priddis or that TWEC did not breach such duty in its performance under such agreements by engaging in conduct that evaded the spirit of such agreements and had the effect of destroying or injuring Priddis' right to receive the fruits of the contracts. See M/A-COM Sec. Corp. v. Galesi, 904 F.2d 134, 136 (2d Cir. 1990); Kirke La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 87, 188 N.E. 163, 167 (1933); Restatement of the Law, Second, Contracts § 205, cmt. d. Rather, TWEC's breach of its duty to act in good faith under the agreements was a breach of the underlying agreements themselves, see Harris v. Provident Life & Accident Ins. Co., 310 F.3d 73, 80 (2d Cir. 2002), and Priddis may recover for TWEC's breaches of its implied duties under Priddis' breach of contract claim, see Canstar v. J.A. Jones Constr. Co., 212 A.D.2d 452, 622 N.Y.S.2d 730, 731 (1st Dep't 1995).

Priddis' complaint alleges several fraudulent representations and conduct by TWEC subsequent to the execution of those agreements that are collateral to one or more of such agreements between the parties. TWEC's motion to dismiss Priddis' conversion claim similarly must be denied because Priddis has alleged wrongdoing by TWEC that goes beyond breach of contract. Because both of these claims survive dismissal, so too does Priddis' request for punitive damages based upon such claims.

With regard to Priddis' unjust enrichment claim, TWEC's motion must be denied because there is a bona fide dispute between the parties regarding the scope and validity of one or more agreements between the parties. Thus, Priddis is not required at this time to elect its remedies and may plead its unjust enrichment claim as an alternative to its breach of contract claim.

STATEMENT OF FACTS

Priddis manufactures and markets karaoke music products. Compl. ¶ 2. Priddis' principal place of business is in Utah. Id. ¶ 1. TWEC operates retail music and entertainment stores throughout the United States, doing business during the relevant time period under various trade names, including "FYE- For Your Entertainment," "Coconuts," "Camelot Music," "Spec's Music," and "Record Town." Id. ¶ 4. TWEC is a publicly traded company on the NASDAQ National Market. Id. ¶ 33.

I. THE PARTIES' INITIAL NEGOTIATIONS AND AGREEMENTS

In 1999, TWEC contacted Priddis with an offer to give Priddis exclusive rights to its karaoke music racks. Id. ¶ 8. Prior to this offer, Priddis had not done any business with TWEC, who was carrying karaoke products manufactured by Sound Choice, a competitor of Priddis. Id. ¶¶ 8-9.

A. The Buy Out Agreement

Prior to entering into any agreement with TWEC, TWEC represented to Priddis that Priddis would be TWEC's exclusive karaoke music supplier and that TWEC would purchase Priddis' product on an ongoing basis. Id. ¶¶ 10 & 25. In reliance on such promises, in or about May 25, 1999, Priddis entered into an agreement with TWEC to "buy out," at its own expense, TWEC's existing inventory originally purchased from Sound Choice and replace it with Priddis' karaoke product (hereinafter, "Buy Out Agreement") (copy attached as Exhibit B to Declaration of Matthew J. Donahue ["Donahue Declaration"]). Id. ¶¶ 11 & 25.

Thereafter, pursuant to the terms of Buy Out Agreement, Priddis accepted trade-out returns from 230 stores, which amounted to over 50,500 CDs and cassettes. Id. ¶ 13. Priddis only was required to issue TWEC credit in the amount of $281,026.00 for these returns. Id. However, TWEC insisted on taking credit in the amount of $336,630.00 and refused to make any payments to Priddis for subsequent product that TWEC had already ordered and received unless Priddis "reconciled" its accounts with TWEC's accounts. Id. ¶¶ 13-14.

Priddis is a small company that relies heavily on its cash flow to remain in business. Id. ¶ 15. TWEC's threat to not pay for product that it had ordered and received until Priddis reconciled its account placed Priddis in severe economic duress, leaving Priddis no choice but to write off the $55,604 difference from TWEC's account. Id.

B. The Vendor Agreement

On or about June 7, 1999, in further reliance on TWEC's representation that Priddis would be its exclusive karaoke supplier, Priddis and TWEC executed a "Vendor Approval Request Form" (hereinafter, "Vendor Agreement"), which set forth the initial terms under which TWEC and Priddis agreed to operate (copy attached as Exhibit C to Donohue Declaration). Id. ¶ 26. The parties agreed to net 60-day payment terms and that TWEC would receive a 2% "Cash Discount for timely payment." Id. ¶¶ 44 & 56.

C. The Display Agreement

Effective October 1, 1999, TWEC and Priddis also entered into a written Point of Sale Display Agreement, which set forth the parties' rights and obligations regarding the display racks supplied by Priddis (hereinafter, "Display Agreement") (copy attached as Exhibit D to Donahue Declaration). Id. ¶ 18. Pursuant to the Display Agreement, Priddis agreed to make display racks available to TWEC at no charge, if TWEC purchased enough karaoke product to fill the displays. Id. ¶ 19. The parties agreed that Priddis would own title to the display racks until TWEC had fulfilled its obligation to purchase enough product to fill the displays. Id. However, if TWEC defaulted on its responsibility to purchase enough product to fill the displays and discontinued purchasing or selling Priddis product, TWEC would be required to return all displays at no cost to Priddis. Id. The Display Agreement further provided that the displays would be used exclusively for the promotion of Priddis' product and that no product from competing companies would be shown on or in connection with such displays. Id. ¶ 20.

The out-of-pocket costs that Priddis incurred pursuant to the Buy Out Agreement and Display Agreement in trading out its product for Sound Choice product and providing

TWEC with displays amounted to over $450,000, which was a substantial investment for Priddis. Id. ¶ 24. Priddis entered into the Buy Out Agreement and Display Agreement, and incurred these expenses, in reliance on TWEC's promise to purchase Priddis' products on an ongoing basis. Id. ¶¶ 25, 126. However, at the time it made this promise, TWEC had no present intention of fulfilling it. Id. ¶ 127. Rather, TWEC had a number of schemes described more fully below, and in its Complaint at ¶¶ 38-79, that it intended to use, as part of its ongoing business practices, to withhold payments for such product. Id. ¶¶ 122-125. In addition, Priddis entered into all of the Agreements with TWEC based on TWEC's representation that Priddis would be its exclusive karaoke supplier, a promise that TWEC never intended to keep when made. Id. ¶¶ 10, 127.

II. TWEC'S POST-CONTRACT CONDUCT AND MISREPRESENTATIONS

Soon after TWEC began to order a substantial amount of product from Priddis in mid-2000, TWEC implemented several schemes to extend its payment terms, withhold payments from Priddis for product that TWEC had ordered and received and manipulate its books to make it appear as though Priddis owed it money rather than vice versa. Id. ¶ 30. Upon information and belief, TWEC pre-determined what it wanted to pay Priddis in any given month and then utilized these schemes to deduct anything in excess of that amount. Id. ¶ 31. Priddis is informed and believes that TWEC did so to manipulate its accounts payable on its books and in its public filings so as to present a better financial picture to its investors, potential investors and creditors. Id. ¶ 34. Priddis is informed and believes that TWEC employed one or more of these schemes, individually and in combination, as part of its ongoing business practices to defraud its suppliers, including Priddis' predecessor Sound Choice, out of money due and owing to them for product ordered and received by TWEC. Id. ¶ 32.

As a result of these schemes, TWEC paid Priddis for less than half of what it ordered and received during the period of their relationship from 1999 through February, 2004. Id. ¶ 35. During that period, TWEC ordered and received a total of $6,192,199 worth of product from Priddis, but only paid a total of $3,088,350 for such orders. Id. ¶ 36.

A. TWEC's Fraudulent Return Scheme

Under normal business practices in the retail music industry, if a CD or cassette does not sell well, a retailer will return the product and not reorder it again. Id. ¶ 40. However, TWEC often returned to Priddis more than half of what TWEC had ordered. Id. ¶ 39. The amount of returns made by TWEC was far in excess of what is standard in the retail music industry. Id. TWEC then frequently reordered items that it had recently returned within the last one or two months. Id. ¶41. Upon information and belief, TWEC's practice of returning and then reordering the same product was a scheme intentionally employed by TWEC to artificially extend its payment terms and perpetually delay making timely payments to its suppliers, such as Priddis, for product it ordered and received. Id. ¶ 42. Priddis is informed and believes that TWEC has employed these same payment delaying tactics with other product suppliers, including Sound Choice. Id. ¶ 43.

Under the terms of the Vendor Agreement, TWEC had sixty (60) days to pay for product it received from Priddis. Id. ¶ 44. Therefore, for example, under normal circumstances, payment for product that TWEC ordered in Month #1 would be due in Month #3. Id. ¶ 45. Rather than pay in full for the product it ordered in Month #1, however, TWEC frequently returned in Months #2 and #3 much of the same product it had ordered in Month #1, thereby effectively wiping out or significantly reducing any payment due in Month #3. Id. TWEC then placed new orders in Months #2 and #3 for the same product it had returned, payment for which would be extended to Months #4 and #5. Id. By repeating this cycle of returns and reorders over and over again, TWEC was able to maintain a large inventory of product without payment obligations becoming due on a significant portion of it. Id. ¶ 46. TWEC then frequently withheld payments due to Priddis on past orders until Priddis shipped current orders. Id. ¶ 49. This effectively kept TWEC overstocked so it could continue its fraudulent return scheme. Id.

TWEC also regularly made very large deductions from payments to Priddis for "anticipated returns." Id. ¶ 51. However, TWEC never made the actual returns of product for which it took a deduction. Id. Although TWEC often subsequently credited the amount of the anticipated return back into its next payment one or two months later, it would often turn around and make another large deduction from such payment for another anticipated return. Id. In this manner, TWEC was able to effectively extended its terms. Id. On at least one occasion, TWEC failed and refused to pay Priddis back for these anticipated returns that were never made. Id. ¶ 52.

TWEC's practice of taking deductions for possible future returns before making an actual return was highly abnormal in the retail music industry. Id. ¶ 53. Upon information and belief, TWEC's practice of taking large deductions out of its payments to Priddis for anticipated returns was a deliberate tactic employed by TWEC to fraudulently extend its payment terms and withhold payments from Priddis for product that it had ordered and received. Id. ¶ 54.

B. TWEC's Fraudulent Discount Scheme

Under the terms of the Vendor Agreement, one of TWEC's valid payment terms included a two percent (2%) discount for paying an invoice on time. Id. ¶ 56. TWEC inappropriately considered returns of product to Priddis as on-time payments, which it claimed qualified for the 2% discount. Id. ¶ 57. However, this was not agreed to by the parties under the terms of the Vendor Agreement. Id. Nonetheless, TWEC regularly took a 2% discount on all of the product that it returned to Priddis. Id. ¶ 58.

The effect of TWEC's practice of returning product and taking a 2% discount was that, in addition to not having to pay for the product, TWEC was able to create a credit on its account with Priddis. Id. ¶ 59. TWEC would then claim that Priddis owed it money, rather than vice versa, and use that as justification for further withholding payments to Priddis. Id. For instance, on or about August 11, 2003, Russell Kellar, a Buyer for TWEC and Priddis' main point of contact with TWEC during much of their relationship, withheld a large payment to Priddis on the basis that TWEC's records showed Priddis owing TWEC money because of returns made by TWEC. Id. ¶ 60.

TWEC also took a 2% on-time payment discount for the "anticipated returns" that were not actually made. Id. ¶ 63. Although TWEC usually added the amount of the anticipated return back into its payment one or two months later, it still took the 2% on time discount and used the deductions for "anticipated returns" as justification for withholding further payments to Priddis. Id. For instance, on or about September 27, 2001, TWEC deducted $86,000 from a payment to Priddis for possible returns that TWEC might send in the future. Id. ¶ 64. Although the $86,000 was a late payment and did not qualify for the 2% discount, TWEC still took the discount and refused to remove it even though it never made the anticipated return. Id. ¶¶ 64-65.

Upon information and belief, TWEC's practice of taking a 2% discount on returns, for which it never paid in the first place, was a willful and deliberate effort to gain leverage against its suppliers, including Priddis, to defraud them out of money due and owing to them. Id. ¶ 61.

C. TWEC's Fraudulent Proof of Delivery Scheme

TWEC routinely demanded that Priddis present proof of delivery on a random and often lengthy list of invoices before it would pay for shipments despite the fact that Priddis had not been informed by an individual store that it had not received a product shipment. Id. ¶ 74. Even though Priddis supplied TWEC with the required proof of delivery documents, on several occasions TWEC ignored Priddis' documentation and deducted from its total payments some or all of the amounts due from invoices in which delivery was disputed. Id. ¶ 75. In addition, on several occasions, even after receiving proof of delivery and paying for the product, TWEC still took a credit on its account claiming that Priddis had failed to provide proof of delivery. Id. ¶ 76. Sometimes these orders for which TWEC claimed Priddis had failed to provide a proof of delivery were almost a year old. Id.

TWEC occasionally added back the amount it had deducted or the credit it had taken into a future check. Id. ¶ 77. However, under these circumstances, TWEC was still able to obtain longer payment terms for product that it had ordered and received. Id. Upon information and belief, TWEC's practice of requiring proof of delivery on shipments that it had received was a deliberate tactic employed by TWEC to fraudulently extend its payment terms and withhold payments from Priddis. Id. ¶ 78.

D. TWEC's Fraudulent Misrepresentations

Priddis complained to higher management at TWEC about TWEC taking a 2% discount on returns and anticipated returns. Id. ¶ 69. Thereafter, TWEC represented to Priddis that TWEC would put new procedures into place so that it would not be taking such discounts. Id. However, TWEC had no present intention of carrying out such promise. Id. ¶ 127. Priddis continued to send new products to TWEC in reliance on such representations. Id. ¶ 128. However, TWEC never followed through on its promises and continued to take such discounts. Id. ¶ 69.

Further, in response to problems Priddis was having with TWEC's return, credit and payment practices, Priddis refused to accept returns unless TWEC complied with specific conditions. Id. ¶ 105-107. For instance, Priddis agreed to accept TWEC's returns upon payment of certain restocking fees, which started at 10%, were raised to 12% and were raised again to 25%, on all items returned. Id. ¶¶ 107 and 112.

TWEC represented to Priddis that it would pay the restocking fees and would comply with the other return conditions in various conversations and emails. Id. ¶¶ 108 and 112. In reliance on TWEC's representations Priddis continued to accept returns and ship orders. Id. ¶ 108. At the time it made these promises, TWEC had no present intention of making such payments or complying with such conditions. Id. ¶ 127. Thereafter, TWEC refused to pay the restocking fees or comply with the other return conditions as promised. Id. ¶¶ 110 & 112. On or about November 30, 2001, Russell Kellar promised in writing to send Priddis a check for some of the restocking fees in the amount of $11,000. Id. ¶ 111. However, Priddis never received a check. Id. Mr. Kellar then informed Priddis that he would not send the payment because TWEC's books showed Priddis owing TWEC money based on recent returns. Id.

ARGUMENT

When ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept the factual allegations alleged in the complaint as true and all reasonable inferences are drawn in favor of the plaintiff. Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996). The Court must not dismiss the claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). Thus, the burden on the moving party is substantial, as the issue before the Court on a Rule 12(b)(6) motion is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims. Gant v. Wallingford Board of Educ., 69 F.3d 669, 673 (2d Cir. 1995).

I. PRIDDIS' FRAUD CLAIM SURVIVES DISMISSAL

In its Motion, TWEC alleges that Priddis' fraud claim should be dismissed for two reasons: (1) the only false statements alleged in the Complaint involve TWEC's intentions regarding its performance of its duties under the contracts between the parties; and (2) the fraud claim is duplicative of the breach of contract claim. (Motion, at 11). TWEC's gross oversimplification of Priddis' Complaint ignores Priddis' allegations regarding several misrepresentations that are not expressly incorporated into, and thus are collateral or extraneous to, any specific provision of one or more of the agreements between the parties. Thus, TWEC's motion to dismiss Priddis' fraud claim should be denied.

More specifically, Priddis' Complaint alleges that TWEC fraudulently induced Priddis into entering into several agreements, including the Buy Out Agreement, the Vendor Agreement and the Display Agreement, by making false promises with no present intention of performing them and that Priddis justifiably relied on such promises to its detriment. Such promises include TWEC's promise to make Priddis its exclusive karaoke provider and its promise, prior to Priddis executing the Buy Out Agreement and the Display Agreement, that it would purchase product from Priddis on an ongoing basis. These promises were collateral or extraneous to the terms of one or more of the agreements between the parties and, thus, provide a basis for Priddis' fraudulent inducement claim.

In addition, Priddis does not only allege that TWEC made false representations prior to the formation of the agreements between them, but Priddis also alleges that TWEC made several subsequent misrepresentations regarding matters that were not expressly incorporated into the written agreements between the parties. For instance, Priddis alleges that TWEC fraudulently misrepresented that it would pay restocking fees on all returns and comply with other return conditions and would stop taking discounts on returns and anticipated returns, which promises are not set forth in the Vendor Agreement. Thus, Priddis has adequately alleged several fraudulent representations collateral and extraneous to the express terms of the parties' agreements that are properly the basis for a fraud claim.

A. Priddis' Allegations Are Sufficient to Support a Fraudulent Inducement Claim

To state a claim of fraud under New York law, a plaintiff must allege a misrepresentation or a material omission of fact that was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury. See Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76, 80 (1996).

Although it is settled under New York law that "mere allegations of breach of contract do not give rise to a claim for fraud or fraudulent inducement," Ohm Remediation Servs. Corp. v. Hughes Envtl. Sys., Inc., 952 F. Supp. 120, 122 (N.D.N.Y. 1997), it is equally well-settled that "if a promise was actually made with a preconceived and undisclosed intention of not performing it, it constitutes a misrepresentation of a 'material existing fact,'" which can serve as the basis for a claim of fraud. Sabo v. Delman, 3 N.Y.2d 155, 160, 164 N.Y.S.2d 714, 716 (1957); Deerfield Communications Corp. v. Chesebrough-Ponds, Inc., 68 N.Y.2d 954, 956, 510 N.Y.S.2d 88, 89 (1986).

An action for fraud may be maintained on the basis of allegations that a party made a collateral or extraneous misrepresentation that served as an inducement to the contract. See Astroworks, Inc. v. Astroexhibit, Inc., 257 F. Supp. 2d 609, 616 (S.D.N.Y. 2003). Therefore, "although a plaintiff cannot disguise a breach of contract claim as a fraud claim, 'a valid fraud claim may be premised on misrepresentations that were made before the formation of the contract and that induced the plaintiff to enter the contract.'" Id. (citing Cohen v. Koenig, 25 F.3d 1168, 1173 (2d Cir. 1994)).

In its Complaint, Priddis alleges several collateral or extraneous misrepresentations made by TWEC prior to the formation or one or more of the agreements between the parties that induced Priddis into entering into such contracts. First, Priddis alleges that, prior to entering into any of the three agreements with TWEC, TWEC promised to use Priddis as its exclusive karaoke supplier. Compl. ¶¶ 8 & 10. This promise is not incorporated into the Buy Out Agreement, the Vendor Agreement or the Display Agreement. Thus, such promise is collateral or extraneous to such agreements and may provide the basis for a fraudulent inducement claim. See, e.g., Deerfield, 68 N.Y.2d at 956 (holding that an oral agreement that was not incorporated into the written sales agreement was collateral to the agreement and could support a fraud claim).

Similarly, Priddis' complaint alleges that it was induced into entering the Buy Out Agreement and the Display Agreement, which required Priddis to incur substantial out-of-pocket costs, based upon TWEC's promise to purchase products from Priddis on an ongoing basis. Compl. ¶ 25. However, at the time it made this promise, TWEC had no present intention of fulfilling it. Rather, TWEC had a number of schemes, including the fraudulent return and discount schemes, that it intended to use, as part of its ongoing business practices, to withhold payments for, and thus frustrate the lawful purchase of, such products.

Although TWEC's obligations regarding the payment of Priddis' products are embodied in the Vendor Agreement, TWEC's promise to purchase products from Priddis on an ongoing basis and the attendant obligations regarding payment for such products (beyond the 1,000 units covered by the Buy Out Agreement) are not expressly incorporated into the terms of the Buy Out Agreement or the Display Agreement. Thus, TWEC's promise is collateral or extraneous to these two agreements and Priddis' fraudulent inducement claim is sufficiently distinct from its breach of contract claims. See Bell Sports, Inc. v. System Software Assoc., Inc., 71 F. Supp. 2d 121, 127 (E.D.N.Y. 1999) (reversing dismissal of fraudulent inducement claim upon finding that the licensing agreement between the parties may not have incorporated the misrepresentations contained in the separate request for proposal).

B. Priddis Has Sufficiently Alleged Post-Contractual Fraudulent Misrepresentations By TWEC that Are Collateral or Extraneous to Any Contract Between the Parties

In its Motion, TWEC alleges that, to be considered sufficiently distinct from its breach of contract claim, Priddis must demonstrate either: (1) a legal duty separate from the duty to perform under the contract; (2) a fraudulent misrepresentation collateral or extraneous to the contract; or (3) special damages. "[T]o be considered 'collateral,' the promise must be to do something other than what is expressly required by the contract." Frontier-Kemper Constructors, Inc. v. American Rock Salt Co., 224 F. Supp. 2d 520, 528 (W.D.N.Y. 2002). "Whether a promise is collateral or extraneous to an agreement depends entirely on the contours of the agreement." Astroworks, Inc., 257 F. Supp. 2d at 616, n.11.

In support of its fraud claim, Priddis also alleges that TWEC made several misrepresentations subsequent to the formation of the contracts regarding matters that were not expressly incorporated into the written agreements between the parties. More particularly, Priddis alleges that TWEC misrepresented to Priddis that TWEC would pay restocking fees on all returns and would comply with other return conditions agreed to by

TWEC in various conversations and emails. Compl. ¶ 107-108, 112. Further, Priddis alleges that TWEC misrepresented to Priddis that TWEC would put procedures in place so that it no longer took a 2% discount on returns and anticipated returns. Id. ¶ 69. In reliance on such representations, Priddis accepted returns from TWEC and continued to ship orders. Id. ¶ 108 & 128. However, at the time it made these promises, TWEC had no present intention of making such payments, complying with such conditions or instituting such procedures and thereafter refused to fulfill any such promises. Id. ¶ 127.

TWEC's promises regarding the payment of a restocking fee, compliance with certain conditions for the return of products and implementation of procedures so as not to take a discount on returns were all made subsequent to the parties' agreements and are not incorporated into the express terms of such agreements, including the Vendor Agreement.[2] These promises all involve doing something in addition to or other than what was expressly required under the terms of those written agreement and, as such,

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2 The fact that Priddis also alleges that these promises were modifications to the contracts between the parties the violation of which constitutes breach of contract is not fatal to Priddis' fraud claims. Priddis anticipates that TWEC will, and it appears from TWEC's Motion that TWEC in fact does, dispute the existence, operation and effect of any promises alleged by Priddis that are not included within the terms of the written Vendor Agreement. See Motion, at 3 (emphasizing that the parties agreed in the Vendor Agreement that "regular orders placed by TWEC were 100% returnable with no exceptions"); 6 (noting "TWEC's unrestricted contractual right to return products"); & 10 (stating that the "Vendor Agreement unambiguously sets forth terms regarding returns (to which TWEC has an absolute right)"). Thus, whether or not such promises are encompassed by the contractual arrangement between the parties is a matter of factual dispute, which cannot be resolved at this stage of the litigation upon a motion to dismiss. See Smehlik v. Athletes & Artists, Inc., 861 F. Supp. 1162, 1172 (W.D.N.Y. 1994) (refusing to dismiss fraud claim because whether or not the oral statements alleged by plaintiff in support of the fraud claim were encompassed by the written contract was a matter of factual dispute); see also Astroworks, Inc., 257 F. Supp. 2d at 617 (denying motion to dismiss on basis that, "[a]t this early stage, it is impossible to know which promises comprised the agreement and which were collateral").

were collateral and extraneous to the agreements. See Kelly v. MD Buyline, Inc., 2 F. Supp. 2d 420, 434-35 (S.D.N.Y. 1998) (refusing to dismiss fraud claim that involved a promise that was made subsequent to the agreement that was the subject of the breach of contract action); Blank v. Baronowski, 959 F. Supp. 172, 180 (S.D.N.Y. 1997) (concluding that statements regarding the existence of a joint venture made to induce plaintiff to extend credit were sufficiently collateral to the joint venture agreement because they were made after its formation).

In this manner, the fraudulent misrepresentations alleged by Priddis are distinguishable from those at issue in the cases cited by TWEC, in which the courts found the alleged misrepresentations to be insufficiently collateral to the obligations contained in the agreement and, therefore, dismissed the fraud claim as not sufficiently distinct from a breach of contract claim. In each of those cases, the alleged misrepresentations all involved obligations that were governed by the express terms of the agreements between the parties. See, e.g., Bridgestone/Firestone Inc. v. Recovery Credit Servs., Inc., 98 F.3d 13, 19-20 (2d Cir. 1996) (misrepresentation regarding payment obligation contained in contract); Lam v. Amer. Express Co., 265 F. Supp. 2d 225, 231 (S.D.N.Y. 2003) (promise to negotiate exclusively with plaintiff memorialized in agreement as defendant's principal obligation); Frontier-Kemper Constructors, Inc., 224 F. Supp. 2d at 526 (misrepresentation regarding obligation to reimburse plaintiff for the purchase insurance, which was contained in contract); Rolls-Royce Motor Cars, Inc. v. Schudroff, 929 F. Supp. 117, 124 (S.D.N.Y. 1996) (promise to pay what owed under terms of contract).

In addition, in one of the cases cited by TWEC, MCI Worldcom Communications, Inc. v. North Amer. Communications Control, Inc., No. 98 Civ. 6818, 2003 WL

21279446, at *9-10 (S.D.N.Y., June 4, 2003), in finding that the representations were not collateral to the agreement, the court actually distinguished cases, including Kelly v. MD Buyline and Blank v. Baronowski cited above, which involved statements made subsequent to the formation of the agreement. See id., at *10-11 (finding that defendants' promises "do not concern statements made subsequent to the Agreement, or matters collateral and extraneous to the subject matter of the Agreement").

Thus, contrary to the argument contained in TWEC's Motion and the supporting case law cited therein, Priddis' allegations go beyond merely alleging that TWEC misrepresented an intent to perform its obligations under the express terms of the parties' agreements. Thus, TWEC's motion to dismiss Priddis' fraud claim should be denied.

II. PRIDDIS' CONVERSION CLAIM SURVIVES DISMISSAL

In its Motion, TWEC argues that Priddis' conversion claim should be dismissed for the same reason as its fraud claim: because it is duplicative of Priddis' breach of contract claim. However, to state a claim for conversion under New York law that is separate and distinct from a contract claim, Priddis need only allege acts that are unlawful or wrongful as distinguished from acts that are a mere violation of contractual rights. See Fraser v. Doubleday & Co., 587 F. Supp. 1284, 1288 (S.D.N.Y. 1984).

As demonstrated above with regard to Priddis' fraud claim, Priddis has adequately alleged several fraudulent misrepresentations by TWEC that go beyond a breach of contract and that have resulted in TWEC's wrongful possession of Priddis' property. See Astroworks, Inc., 257 F. Supp. 2d at 618 (denying motion to dismiss a conversion claim upon finding that plaintiff alleged wrongdoing in support of a fraud claim that went beyond breach of contract). Thus, TWEC's motion to dismiss Priddis' conversion claim should be denied.

III. PRIDDIS' UNJUST ENRICHMENT CLAIM SURVIVES DISMISSAL

TWEC also seeks to dismiss Priddis' unjust enrichment claim on the basis that it is duplicative of its breach of contract claim. As TWEC points out, the general rule is that quasi-contractual relief, such as unjust enrichment, is not permitted when an express agreement exists that governs the particular subject matter of the dispute between the parties. See Clark-Fitzpatrick, Inc. v. Long Island R. Co., 70 N.Y.2d 382, 388-89, 521 N.Y.S.2d 653, 656 (1987).

However, where there is a bona fide dispute as to the existence, scope, or enforceability of the contract, or where the contract does not cover the dispute in issue, a plaintiff may defer election of remedies and seek damages on alternative theories of breach of contract and *quantum meruit*. See Sternberg v. Walber 36th Street Assoc., 187 A.D.2d 225, 228, 594 N.Y.S.2d 144, 146 (1st Dep't 1993) (holding that plaintiff may proceed upon a theory of *quantum meruit* and breach of contract and need not elect his remedies where the contract did not cover the issue in dispute between the parties); Net2Globe Int'l, Inc. v. Time Warner Telecom, 273 F. Supp. 2d 436, 466 (S.D.N.Y. 2003) (holding that, where one party asserted fraudulent inducement, the validity of the parties' contracts was a matter of dispute permitting the party to assert unjust enrichment as an alternative to its breach of contract claim).

Although TWEC has yet to answer Priddis' complaint, it is likely that there is a dispute between the parties regarding TWEC's obligation to pay restocking fees for all returns of Priddis' product and TWEC's agreement to make returns subject to certain other conditions, such as inclusion of certain paperwork and prior to certain deadlines.

Priddis alleges in its Complaint that, subsequent to the formation of the Vendor Agreement, TWEC promised to make such payments and comply with such conditions. However, these obligations are not explicitly covered by the terms of the Vendor Agreement. In its Motion, TWEC alleges several times that it had an unrestricted and absolute right to make returns. See Motion, at 3 (emphasizing that the parties agreed in the Vendor Agreement that "regular orders placed by TWEC were 100% returnable with no exceptions"); 6 (noting "TWEC's unrestricted contractual right to return products"); & 10 (stating that the "Vendor Agreement unambiguously sets forth terms regarding returns (to which TWEC has an absolute right)").

Thus, there appears to be a bona fide dispute between the parties regarding the scope of the Vendor Agreement and dismissal of Priddis' unjust enrichment claim is unwarranted at this time. See Bridgeway Corp. v. Citibank, N.A., 132 F. Supp. 2d 297, 305 (S.D.N.Y. 2001) (holding that "[b]ecause there is a dispute as to defendant's obligations under the contract, . . ., plaintiff's unjust enrichment claim survives"); see also Seiden Assoc., Inc. v. ANC Holdings, Inc., 754 F. Supp. 37, 40 (S.D.N.Y. 1991) ("Dismissal of plaintiff's alternative theories at this stage would violate the liberal policy of Rule 8(e) which allows plaintiffs wide 'latitude' in framing their right to recover").

In addition, Priddis has asserted fraudulent inducement with regard to the parties' agreements. Thus, the validity of such agreements are in dispute. "[A]s long as a factual issue remains as to [Priddis'] fraud claim, recovery under a theory of unjust enrichment may be proper, even in the presence of an alternative breach of contract claim." Ox v. Union Cent. Life Ins. Co., No. 94 Civ. 4754, 1995 U.S. Dist. LEXIS 15997, * 15 (S.D.N.Y. 1995); see also Net2Globe Int'l, Inc., 273 F. Supp. 2d at 466; Niagara Mohawk

Power Corp. v. Freed, 265 A.D.2d 938, 939, 696 N.Y.S.2d 600, 602-03 (4th Dep't 1999). Thus, TWEC's motion to dismiss Priddis' unjust enrichment claim must be denied.

IV. PRIDDIS' CLAIM FOR PUNITIVE DAMAGES SURVIVES DISMISSAL

TWEC moves to strike Priddis' demand for punitive damages on the ground that the Court should dismiss Priddis' tort claims, thus leaving ordinary contract claims for which such damages are unavailable. Because, as demonstrated above, Priddis' fraud and conversion claims survive dismissal, so too does Priddis' request for punitive damages.

CONCLUSION

For the foregoing reasons, Priddis respectfully requests that the Court deny TWEC's motion to dismiss Priddis' causes of action for fraud, conversion, and unjust enrichment and TWEC's motion to strike Priddis' claim for punitive damage.

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Respectfully submitted,

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By: /S/

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